No. 14330.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACE TRACTOR & EQUIPMENT CO., INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

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Appellee.

APPELLANT'S OPENING BRIEF.

Basis of Jurisdiction of the District Court and This Court.

There is no dispute about the jurisdiction of the District Court or of this court. The litigation arises out of an agreement and claim for indemnity and the suit in the District Court was by libel *in personam* in admiralty.

Admitted allegations in the pleadings show that the causes of action set forth in the libel are within the admiralty and maritime jurisdiction of the District Court, pursuant to Article III, Section 2 of the United States Constitution, and Title 28, United States Code, Section 1333 [R. 13, 20]. The jurisdiction of this court to review the decree rests upon Title 28, United States Code, Section 1291, notice of appeal having been filed within the time provided by Title 28, United States Code, Section 2107.

Statement of the Case.

1. The facts which give rise to this litigation are briefly as follows:

Appellee Olympic Steamship Co., Inc., was the bareboat charterer of the S.S. Edward A. Filene, a United States Merchant vessel. On or about May 28, 1948, Olympic entered into a Voyage Charter Party with appellant, Ace Tractor & Equipment Co., Inc., which provided for a voyage from San Francisco to Alaskan waters and return. This Charter Party contained an indemnity clause [R. 4], reading as follows:

> "The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner upon demand a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractor appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them."

Calvin H. Sides was employed by Olympic as radio operator and seaman for the voyage. While in Amchitka, in the Aleutian Islands, Ace commenced to load a cargo of scrap metal landing mats.

The members of the crew of the Edward A. Filene assisted in the loading. Sides was working in No. 4 hold. The procedure was for the landing mats to be lowered into the hold in bundles weighing about 2,000 pounds. Each load was supported by 2 falls, each running to a separate winch. Both winches were operated by the same driver, an employee of Ace and not a member of the crew. In order to place the mats in the "wings" of the hold, one fall lowered the mats directly through the hatch. The fall from the other winch was rove through a block attached by a wire strap either through a limber hole or pad eye in the frame of the side of the vessel and then attached to the load of mats. Thence, by slacking on the first and taking up on the second runner, the winch driver could pull the load sideways to the wing in the direction of the limber hole or pad eye. Once the load disappeared within the hold, it was not visible to the winch driver who then acted upon the directions of others. The precise manner in which the gear was rigged at the time of the accident is unknown.

Ace was in charge and control of the loading operation, although the master and first mate of the Filene had general over-all duties with regard to the operation, had inspected the stowing and the master received additional compensation from Ace for his assistance in the loading. The master was on the day in question present and participating in loading activities.

On the afternoon of June 19, 1948, a strap in No. 4 hold parted and a load of the steel mats struck Sides, seriously injuring him.

Subsequently, Sides commenced two actions to recover damages for his injuries. One, against Olympic, was commenced in the United States District Court, Western District of Washington, Northern Division, in which Sides based his claim as an injured employee upon allegations both of unseaworthiness of the vessel and negligence of Olympic.

Sides also brought suit against Ace in the Superior Court of the State of California, in and for the County of Los Angeles, alleging that the gear in No. 4 hold was jointly rigged by Ace and Olympic in an improper manner and that this, coupled with the incompetence of the winch driver which was also known to both Ace and Olympic, was "joint negligence" of both which was the proximate cause of Sides' injury.

Olympic negotiated a settlement with Sides in the amount of $14,000. In consideration of the procurement of a dismissal of Sides' action against Ace, counsel for Ace signed an agreement that the amount paid by Olympic was a fair and reasonable sum, but such agreement was made expressly without prejudice to Ace, and also stated "that by so agreeing we are not admitting any liability on our part." As a result, both actions were dismissed with prejudice by Sides.

2. The history of this action is as follows:

Olympic's libel contains two causes of action: the first seeks indemnification for the $14,000, together with additional enumerated expense of litigation; the second, upon the same facts, seeks contribution from Ace as a joint *tort-feasor* for a sum equal to the percentage of the whole damage, to which the alleged negligence of Ace contributed.

Appellant's answer denied liability under either cause of action.

Trial was held on January 12, 13, 14, 1954. No testimony of the injured man or any other eyewitnesses was placed in the record. The testimony as to the accident consisted solely of the deposition of the master of the Edward A. Filene [R. 119-142] and the loading manager or "walking boss" of Ace [R. 83-97], both of whom arrived at the scene of the accident after it had occurred.

On February 17, 1954, Ace filed and served objections to Olympic's proposed Findings of Fact, which were overruled without comment by the District Court. Thereafter the District Court issued its final decree in favor of Olympic and against Ace; followed by Findings of Fact and Conclusions of Law, dated and docketed February 18, 1954.

On March 26, 1954, appropriate documents for appeal from this decree were filed by Ace.

Specifications of Errors Relied Upon.

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ARGUMENT.

Prefatory Statement.

Olympic seeks indemnity from Ace. In order to succeed, Olympic must walk a thin line. It must establish facts which prove that it was liable to Calvin H. Sides for his injuries and not a volunteer in making payment for the same, and yet, such liability must not have been the result, even in part, of an independent act of negligence of its own.

This is true because of the well established rules that indemnity does not lie for the volunteer and that even in admiralty there is no contribution between joint *tort-feasors* in personal injury cases.

The Toledo, 122 F. 2d 255 (2 C. C. A., 1941); cert. den., 314 U. S. 689, 86 L. Ed. 551;

Halcyon Lines v. Haenn Shipping Corp. (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318.

This Is an Admiralty Case Based Upon Deposition and May Therefore Be Viewed De Novo by This Court.

This is an action in admiralty. In addition, all of the facts concerning the injury of Mr. Sides were presented to the trial court either by stipulation or deposition. For both reasons, it is well established that this court is not bound by the findings of fact below.

Admiralty courts are not as closely bound by the determination of the trial court as they would be if governed by Rule 52(a), Federal Rules of Civil Procedure, which re-

quires that the findings may be disregarded only if "clearly erroneous."

Cramp Shipbuilding Co. v. Luckenbach S.S. Co., 181 F. 2d 939 (C. C. A. 3, 1950);

Matson Nav. Co. v. Pope & Talbot, 149 F. 2d 295, 298 (C. C. A. 9, 1945), cert. den., *sub nom., Pope & Talbot, Inc. v. Matson Nav. Co.,* 326 U. S. 737, 90 L. Ed. 439.

As this court said in *Johnson v. Griffiths S. S. Co.,* 150 F. 2d 224 (9 C. C. A.), at page 225:

"Since all material facts in this case were established by deposition, the findings of the District Court are not accorded as great weight as they might be if that court had had an opportunity to observe and hear the witnesses testify to the facts. Furthermore, since this is a case in admiralty, the matter may be tried *de novo* in this court."

The Record Does Not Support a Finding of Defectiveness in the Strap.

ASSIGNMENT OF ERROR No. 1.

"The Court erred in finding that Respondent Ace Tractor & Equipment Company, Inc., at and immediately prior to the time of the accident to Calvin H. Sides, was the owner or in control of and selected for use a certain wire or steel cable, also referred to as a plow steel wire strap."

ASSIGNMENT OF ERROR No. 2.

"The Court erred in finding that Respondent, Ace Tractor & Equipment Company, Inc., had supplied and brought aboard the SS 'Edward A. Filene' a certain wire or steel cable, also referred to as a plow steel wire strap."

ASSIGNMENT OF ERROR No. 10.

"The Court erred in finding that the certain wire or steel cable, also referred to as a plow wire strap, was not adequate for the purpose for which it was supplied and used at the time of the accident to Calvin H. Sides."

ASSIGNMENT OF ERROR No. 11.

"The Court erred in finding that the inadequacy of that certain wire or steel cable, also referred to as a plow steel wire strap, was a proximate cause of its failure and parting."

ASSIGNMENT OF ERROR No. 12.

"The Court erred in finding that the said certain wire or steel cable, also referred to as a plow steel wire strap, failed and parted when being used for the purpose of assisting in dragging and pulling a sling load of landing mats."

ASSIGNMENT OF ERROR No. 13.

"The Court erred in finding that all of the appliances and equipment being used at the time of the accident to Calvin H. Sides were under the management and control of Respondent."

ASSIGNMENT OF ERROR No. 15.

"The Court erred in finding that the said SS 'Edward A. Filene' was unseaworthy at the time and immediately prior to the accident to Calvin H. Sides."

ASSIGNMENT OF ERROR No. 17.

"The Court erred in finding that the failure of that certain wire or steel cable, also referred to as a plow steel wire strap, caused and permitted the sling load of landing mats to swing and strike said Calvin H. Sides with great force and violence."

In reviewing this record it should be remembered that the burden is upon Olympic to establish all of the actionable facts. (*States S.S. Co. v. Rothschild International Steve. Co.,* 205 F. 2d 253 (9 C. C. A., 1953).) Except in the instant case, the parties stipulated to the fact that payment of $14,000.00 was made by Olympic to Sides and that if liability existed, the amount paid was a reasonable one.

However, to prevail, Olympic must still establish that the settlement made was on a claim for which it was liable and that this liability was not the result, even in part, of its own independent acts of negligence.

Whether this burden is met turns on the facts of record as to the accident and injury to Mr. Sides. The record here as to these facts is sparse, indeed. There is no testimony from anyone who saw the accident, nor of the injured man. Olympic's burden must be met, if at all, by the deposition testimony of its two witnesses, the master of the Edward A. Filene and the Ace walking boss, who arrived on the scene after the accident.

The paucity of the record is particularly evident with regard to the findings as to the parted strap.

The District Court found that Ace owned, selected and controlled this particular strap [Finding V]. Moreover, the strap was found to be not adequate [Finding VI], to have failed [Finding VIII], to be defective [Finding X] and unseaworthy [Finding VIII].

By stipulation the parties agreed that Ace was in charge and control of the loading of cargo in the hold at the time of Sides' injury. There was no evidence, however, as to control of the strap.

As to ownership, the record indicates only that Ace was supposed to furnish its own equipment [R. 65, 137] including straps. The ship had on board similar straps of its own [R. 130] which may possibly have been used [R. 136]. One of the libelant's two witnesses said that he could not swear who owned the strap in question [R. 66] while the other admittedly based his conclusion on what *should* have been the case [R. 137]. Appellant submits that such proof fails to meet the legendary bare scintilla necessary for a plaintiff or libelant to sustain its burden of proof.

However, this point need not be labored other than to indicate the general nature of the proof presented by Olympic. Throughout, the findings of fact have been drawn solely from what should have been or by what probably was—in short, by speculation. Eyewitness testimony or real evidence (*e.g.,* the strap itself) are nowhere in existence.

Admitting *arguendo* the ownership and control of the strap by Ace, there is no evidence at all that the strap was defective.

The sole evidence as to the condition of the parted strap was the tesitmony of the vessel's master, Gerald Reilly. He stated, "Well, it had been used but it was a fairly new strap. An old strap would be rusty or you could tell they had been used. They get kinky" [R. 126].

The record does contain the testimony of Reilly that the breaking point of such a strap in good condition was fifteen tons and that the safe working load of such a strap was about one-fifth of the breaking strain [R. 124]. The Master further testified that such a strap in good condition would stand a load of 2,200 lbs. without any

trouble [R. 126]. The sling loads of landing mats weighed approximately 2,000 lbs. [R. 59]. Since a broken strap was found at the scene it was evidently concluded by the court below that the strap must have been "defective" or "not adequate."

Such a conclusion is unwarranted. If a snatch block and strap were being used at the time of the accident, it was because the men were engaged in "winging out" the landing mats. The strap did not part while passively supporting a load of 2,000 lbs. The record is silent, however, as to the actual manner of rigging prior to the accident.

Mr. Southerland, the walking boss for Ace, testified for Olympic that the breaking of the strap could have been caused by "tight-lining" [R. 77]. He said:

> "Well, you see, when you are heaving on anything like that that has to be stowed out in the wing, and you are using a snatch block, you just have to barely float it, because you [31] have such poor drift anyway that you are almost pulling against the two runners, and if you try to go too high you start pulling against the two runners, and something has to carry away. I mean something just has to give if you keep heaving on it."

Thus, rather than a tension of only 2,000 lbs., such a maneuver could subject the strap to an excessive strain. A strap so parted may be termed "not adequate," but this is not because of any "failure" or defect which would create unseaworthiness. It is because *no* strap of workable dimensions could stand being subjected to the strain of two opposing winches.

In the absence of any evidence of defectiveness and with at least an equally plausible explanation of the

cause for the parting, it is submitted that the trial court erred in finding that the strap was defective or unseaworthy.

The Record Does Not Support a Finding of Incompetence on the Part of the Winch Driver.

ASSIGNMENT OF ERROR No. 7.

"The Court erred in finding that the winch operator of the SS 'Edward A. Filene' was not a competent winch driver."

ASSIGNMENT OF ERROR No. 8.

"The Court erred in finding that the said winch operator was known to be incompetent to Respondent."

ASSIGNMENT OF ERROR No. 9.

"The Court erred in finding that Gene Southerland negligently permitted said winch operator to continue to operate and control said steam cog winch up to and including the time of the accident to Calvin H. Sides, and that said negligence was one of the proximate causes of the injury sustained by Calvin H. Sides."

The sole references to the ability of the winch driver which were made in the record subject to various objections are as follows:

Testimony by Ace walking boss, Gene Southerland:

"Q. At any time did you form any conclusion, after observing his work, as to his ability or inability to operate winches? A. Well, he isn't a competent winch driver." [R. 69.]

"Q. Mr. Southerland, at what time after you reported to the vessel to work did you form any opin-

ion as to Mr. Bigsley's competency or incompetency to drive winches? A. When he first went to work." [R. 71.]

"Q. And could you tell us just briefly, as laymen what you, as an experienced winch driver, observed about Mr. Bigsley that permitted you to form a conclusion that he was not competent? A. Well, I don't know how to explain it to you.

Q. Well, in other words, just what you saw him do and what it meant to you? A. Well, here is—one way—now, you take a person that has any experience around gear like that—you know that gear is tested for five ton, but it isn't a good idea to take five ton right off the dock, although it is done lots of times, but someone like him, you could tell him to pick up ten ton with it, and he just has no idea of what the gear can do. I mean he is—put it this way: If he was here in the States where you had men, they wouldn't even let him take one load in. When he took one load, that would be the end of him." [R. 72-73.]

"Q. From your experience as a winch driver and from observing the operation going on at Amchitka just [28] prior to the accident, could you tell us just whether or not, in your opinion, the officers would have any reason to know that Mr. Bigsley was incompetent? Just 'Yes' or 'No.' A. No." [R. 74-75.]

"Q. When did you form an opinion that this chap whom you noticed at the winches, at No. 4, right after the accident, was incompetent as a winch driver? A. Oh, when we first started working cargo.

Q. Would you say two or three days [50] before? A. Well, whenever we started working cargo —four or five, or whatever it was.

Q. It was quite obvious to you that he didn't know what he was doing? A. Yes.

Q. But you nevertheless let him go ahead and continued to run this gear? A. I had no alternative.

Q. You had a chap by the name of Fink who was about to run winches who was on board? A. He was on another set of gear at the time.

Q. At which time are you refering to—at the time of the accident? A. See, at the time of the accident, I think he was tending hatch at No. 4, I think at that time, either that or he was driving 5. I forget just what it was now

Q. Well, if I were to tell you that he testified in one of these preceding proceedings that he was tending hatch at No. 4 at the time of this accident, would that refresh your recollection as to what he was doing at the time? A. See, he is the winch driver that I hired in Anchorage." [R. 93.]

"Q. Well, do you remember having seen Fink at [51] No. 4 right after this accident happened? A. Yes.

Q. Fink could run the winches, couldn't he? A. Yes, which he did.

Q. He took over after the accident? A. Yes. Well, he was running them—you see, they work hour for hour." [R. 94.]

"Q. Now, were all of those winch drivers that were engaged in this loading before the accident, with the exception of this fellow Bigsley, competent winch drivers, in your opinion? A. Well, I had one fellow before Bigsley I got rid of.

Q. And that was before the accident? A. Yes.

Q. The rest of them seemed to know what they were about? A. No, but that is all there was.

Q. You didn't see the accident, did you [53]? A. No, sir." [R. 95.]

Testimony by Captain Gerald J. Reilly:

"Q. Did you actually observe the winch driver named Bigsby or Bigby operating the winch which was involved in Mr. Sides' accident at any time before the accident? A. Well, I saw him there.

Q. Did he appear to you to be an incompetent winch driver or did he do anything that indicated to you that he was incompetent? A. Usually the way you tell is when they break down your gear.

Q. So you didn't see him break any of your gear? A. No." [R. 125.]

"Q. Nothing broke until the time of this accident? A. That's right." [R. 126.]

"Q. Captain, you actually relieved the winchman during various times of this unloading job? A. Once in a while.

Q. Up at Amchitka? A. Yes." [R. 142.]

This evidence must have been offered for one of two purposes: (1) To prove the commission of the particular act of negligence on the part of the winch driver which injured Sides; (2) to establish that Ace knowingly continued to employ an incompetent individual.

A party cannot prove the commission of a particular negligent act by opinion evidence of an actor's general lack of skill.

Rowe v. Such, 134 Cal. 573, 66 Pac. 862;

1 *Wigmore on Evidence,* p. 476.

With regard to the second purpose, general incompetence can sometimes be established by evidence of particular past actions.

Holland v. Southern Pacific Company, 100 Cal. 240, 34 Pac. 666.

It is significant that Olympic developed no evidence of particular past actions. The sole reference to any specific action by the winch driver is from the Master, Reilly, whose test of a winch driver's competence was whether he broke down gear. Reilly did not see the driver do this [R. 125].

In the absence of concrete examples, Olympic resorted to opinion testimony of Southerland to establish the employment of a known incompetent.

Upon being asked his opinion, Mr. Southerland jumped to the ultimate fact. "Well, he isn't a competent winch driver." [R. 60.] We were told nothing more. What does this mean? What are Mr. Southerland's standards of judgment? Does he mean that the driver was less able than himself and therefore "incompetent"; that he was less able than the drivers in the United States proper, but as available as any in Alaska? Opinion testimony cannot include the bald statement of ultimate facts.

2 *Jones on Evidence,* 4th Ed., Sec. 372, p. 697.

No concrete reasons were given for Southerland's opinion. When asked for them, he professed inability to explain [R. 72]. Then he answered by merely re-stating his opinion [R. 73]. It is always the duty of the party utiliz-

ing alleged expert testimony to make clear the factual basis upon which the person's opinion will be based. This is customarily done by the hypothetical question. In the instant case, no factual basis is presented at all.

The opinion of an expert as to a person's lack of judgment should be tested by a consideration of the facts from which that opinion is derived, and if they do not justify the conclusion, the opinion is arbitrary and to be rejected.

> *Guardianship of Waite* (1939), 14 Cal. 2d 727, 97 P. 2d 238.

It is submitted that the instant case comes clearly within the logic of the *Waite* decision and that Southerland's testimony must be disregarded for purposes of this appeal.

Olympic Made Payment to Calvin H. Sides as a Volunteer and Thus Is Not Entitled to Indemnity.

Assignment of Error No. 14.

> "The Court erred in finding that the accident to Calvin H. Sides was such that in the ordinary course of things does not happen if those who have the management and control of said appliances and equipment use reasonable care."

Assignment of Error No. 22.

> "The Court erred in finding that there was any legal liability imposed upon Libelant Olympic Steamship Co., Inc., as a result of the injury to Calvin H. Sides."

To bolster the judgment below in the absence of any evidence demonstrating what proximately caused Sides' injury, Finding No. 14 suggests that Ace is responsible

because of the doctrine of *res ipsa loquitur*. This approach is patently inconsistent with Olympic's own admission of negligence [R. 11].

Olympic, however, to recover indemnity must prove its settlement with Sides was not as a volunteer but prompted by the fact that Sides could have in the first instance recovered a judgment from Olympic.

> *Oregon-Washington R. & Nav. Co. v. Washington Tire & Rubber Co.,* 126 Wash. 565, 219 Pac. 9 (1923);
>
> *State v. City of Bremerton,* 2 Wash. 2d 243, 97 P. 2d 1066 (1940).

The findings of the trial court place no responsibility for Sides' injury on Olympic because of its own acts. Assuming for argument the validity of these findings, Olympic's liability must have been imputed and without active fault. It is obvious that what was here contemplated was the shipowner's liability for unseaworthiness, a form of absolute liability.

It has been shown that there is no evidence as to defectiveness in the strap which might have caused the accident. Conceivably, there are several explanations as to how the incident might have occurred, not all of which would be actionable. One possible cause might be "tight lining" of the runners by the winch driver which could create such tension that the strap would part.

Would this negligence of Ace's agent create liability on the part of Olympic? The findings assume that in such a case Olympic would be liable to Sides for unseaworthiness.

It is submitted that the law creates no such liability, as a review of the concept of seaworthiness will show.

A Single Transitory Act of Negligence Committed by a Third Person Cannot Create an Unseaworthy Condition Resulting in the Shipowner's Liability.

ASSIGNMENT OF ERROR NO. 15.

"The Court erred in finding that the said SS 'Edward A Filene' was unseaworthy at the time and immediately prior to the accident to Calvin H. Sides."

ASSIGNMENT OF ERROR NO. 16.

"The Court erred in finding that the place where Calvin H. Sides was working at the time of his accident was not a reasonably safe place to work"

Seaworthiness means the sufficiency of a vessel, her equipment, provisions and crew, to undertake the voyage or service in which she is employed. Obviously, there can be no fixed or positive standard of seaworthiness. Seaworthiness is a relative term and the standard varies with the type of vessel and her undertaking. Absolute perfection is not required; rather, the test is one of reasonable fitness. *The Southwark,* 191 U. S. 1, 48 L. Ed. 65 (1903). However, if there is a finding of unseaworthiness in a personal injury case, the vessel and her owners are liable without regard to fault or the exercise of due diligence to make the vessel seaworthy.

In a personal injury case a jury charge on the subject of unseaworthiness was reviewed. (*McLeod v. Union Barge Line Co.,* 95 Fed. Supp. 366 (W. D. Pa., 1951), affd. *per curiam,* 189 F. 2d 610 (C. C. A. 3, 1951). At *page 369* the following jury instructions were held properly to define seaworthiness:

> " ' "Seaworthiness" means reasonable fitness for the voyage or the work to which the vessel is to be applied. It is a vessel in a fit state as to repairs,

equipment and crew, and in all other respects to encounter and meet the ordinary perils of the voyage. The test of seaworthiness is whether the vessel is reasonably fit to carry a cargo and crew which she has undertaken to transport.

" 'To review, seaworthiness means reasonable fitness to meet the circumstances and the use to which the boat is to be applied on the waters where it is sailing. It means that ordinary and usual circumstances must be anticipated by the owner or the master of the ship to provide the seaman or the employees with a vessel that is sufficient and fit to encounter the ordinary perils of the contemplated voyage. In short, it is the sufficiency of the boat or the vessel in materials, construct (*sic*), function, equipment, officers, crew and outfit for the trade or service in which it is being employed.' "

This obligation, traditionally owed by an owner of a ship to seamen, has been extended to those working aboard the ship.

Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099;

Pope & Talbot v. Hawn, ... U. S. ....., 98 L. Ed. (Adv.) 101.

These cases establish this duty on the part of Olympic to Sides, whether he was considered a member of the crew or an employee of Ace Tractor. Moreover, the obligation covers such a person where the unseaworthy condition is created by defective equipment, even if the equipment was owned by a third party.

Alaska S.S. Co. v. Petterson, ... U. S. ....., 98 L. Ed. (Adv.) 499.

Yet liability for unseaworthiness must be distinguished from liability for negligence. (*Pope & Talbot v. Hawn, supra,* (esp., concurrence of Frankfurter, J., p. 107 *et seq.*). Of course certain negligent acts can create an unseaworthy condition. (*State S.S. Co. v. Rothschild,* 205 F. 2d 253 (C. C. A. 9, 1953).) But negligent acts which create unseaworthiness must create a condition of some permanence. Unseaworthiness has never been applied to transitory unsafe conditions.

In *Cookingham v. United States,* 184 F. 2d 213 (3 C. C. A. 1953), cert. den. 340 U. S. 935, 95 L. Ed. 675, while going down a stairway a ship's cook slipped on a substance, apparently jello, injuring his knee. The court held that the vessel was not liable for unseaworthiness, saying:

> "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use, as happened in the case before us. * * *
>
> "In the present case the stairway upon which the libelant slipped was perfectly sound, its unsafe condition being the sole result of the temporary presence of a foreign substance upon it. To extent the doctrine of unseaworthiness to cover such a case as this would be to make the shipowner an insurer against every fortuitous or negligent act on shipboard which results in temporarily rendering an appliance less than safe even though he may have no knowledge of or control over its happenings, and without giving him a reasonable opportunity, such as is afforded by the safe place to work doctrine of the law of negli-

gence, to correct the condition before he becomes liable for it. The ancient admiralty doctrine of unseaworthiness has never gone so far."

This distinction was recognized by this court in *State S.S. Co. v. Rothschild, supra,* when it discussed examples of negligent acts which created an unseaworthy condition. Thus analogy was drawn to the duty of a landowner to keep his premises in a safe condition, or of a municipal corporation to maintain its streets. These analogous cases show the inherent limitation in the doctrine. Thus, a municipality is not liable for the damage caused by an automobile collision merely because the cars were upon a public street. The duty to maintain in a safe condition applies only to matters over which the municipality, landowner or shipowner can have some control and about which they can have some knowledge. This duty cannot extend to the fleeting, transitory acts of negligence of a third party.

The law imposes no such liability on shipowners through the doctrine of unseaworthiness.

The Findings Justify No Other Basis for Liability of Olympic to Sides.

Appellant contends that the record cannot substantiate either findings of defectiveness in the strap or incompetence on the part of the winch driver. It further contends that one act of its servant, the winch driver, even if negligent, could not create liability on the part of Olympic.

For these reasons, Olympic would not be liable for any acts of Ace, and any payment to Sides made on this basis would be as a volunteer.

Even if Liable, Olympic Was Only so as Joint Tortfeasor and May Not Seek Indemnity.

ASSIGNMENT OF ERROR No. 20.

"The Court erred in finding that libelant Olympic Steamship Co., Inc., was not guilty of any active fault or active negligence in connection with the injuries or damage sustained [47] by the said Calvin H. Sides."

ASSIGNMENT OF ERROR No. 21.

"The Court erred in failing to find that the receipt and release executed by Calvin H. Sides on or about the 16th day of January, 1950, did not constitute a complete defense to the prosecution of the within libel by Libelant Olympic Steamship Co., Inc., against Respondent Ace Tractor and Equipment Co., Inc."

If there is no liability on the part of Olympic because of unseaworthiness, what other possible grounds exist? Olympic would not, of course, be liable in negligence for the acts of Ace's servants. Theoretically, this leaves only liability for acts of Olympic's *own* agents either in negligence or for unseaworthiness. Even if such acts were only partially responsible for the accident, they would preclude indemnification.

It is clear that the injured man believed that Olympic was a party to his injury. Thus Sides' complaint against Olympic alleged liability on the part of Olympic for unseaworthiness *and* negligence [R. 31]. These claims were not made alternatively. His complaint against Ace alleged, among other things, the *"joint* negligence" of both Ace and Olympic caused by *joint* rigging in an improper manner. [Libelant's Ex. 2.]

In *Lamb v. Belt Casualty Co.* (1935), 3 Cal. App. 2d 624, 40 P. 2d 311, in determining the liability of an alleged indemnitor, the court looked to the original complaint of the injured parties, which alleged liability because of negligent operation of a "truck and trailer." The defendant's contract for liability applied only to the truck. At trial of the first action, the facts indicated that the collision had been only to the trailer, which had been improperly lighted, although lights were on the truck itself. Nevertheless, the court held defendant liable, stating at pages 628-629:

> "By returning general verdicts awarding damages to the plaintiffs, Davis and Barr, the jury in each case impliedly found that both truck and trailer were at the time of the accident being operated negligently and that the negligent operation of the truck, as well as the trailer, contributed proximately to the injuries complained of and to the damage of the plaintiffs in the amounts awarded (24 Cal. Jur. 893)."

In the instant case the original action did not result in a general verdict but rather a settlement; however, the court in the *Lamb* case held that a judgment or a settlement would have equal effect (p. 631). (See, also, *Chrysler Motors v. Royal Indemnity Co.* (1946), 76 Cal. App. 2d 785, 174 P. 2d 318.) In either situation, therefore, there is an implied finding as to the facts alleged in the original complaint.

The settlement agreement of Olympic itself does nothing to negate liability for Olympic's negligence. Indeed, the agreement recites that the payment to Sides was for "all damages * * * for negligence or otherwise" [R. 9]. Thus, negligence is expressly stated as the ground for settlement.

Nor does the somewhat sparse evidence fail to show some evidence of its initial liability for negligence. Thus, both the captain and chief mate had general inspection duties with regard to the loading operation [R. 58, 130], and the master received $200 in additional pay for assisting in the cargo loading [R. 137]. Captain Reilly, in fact, at times operated the ship's winches [R. 142].

It should be noted that the rigging in the hold was frequently changed and the strap and snatch block shifted. Southerland testified that if the strap had been rigged through a limber hole it would have come in contact with a relatively sharp surface and that it is possible through continued use or excessive strain for the strap to be cut [R. 91]. Working in the hold with Sides at the time of the accident were 8 other members of the crew [R. 135].

Olympic is well aware of this problem. It sought relief by characterizing its admitted negligence as "passive" [R. 11], although its second cause of action shows anticipation of a possible alternative interpretation and seeks contribution from Ace as a joint tort-feasor [R. 14].

But Olympic, because it was first on the scene, may not append undisputed labels to its conduct. The nature of its actions must be determined from the facts. Its admitted negligence may give rise to an independent cause of action.

If there was independent liability of Olympic, it may not seek indemnity here. Thus, in *Alaska Pacific S.S. Co. v. Sperry Flour Co.* (1922), 122 Wash. 642, 211 Pac. 761, a longshoreman recovered against a steamship company for a fall from a plank because of the failure of the company to supply a safe place to work. The steamship company sought indemnity against the pier owner. The

court held that while the pier owner was primarily liable to keep the premises safe,

> "* * * still, if the steamship company by some independent act of negligence on its part caused or contributed to the accident, it thereby would become a joint *tort-feasor* and could not recover. * * * That primary duty, however, on the part of respondent did not relieve the appellant from the duty of exercising care in the control of and with respect to the condition of appliances which it called upon its servant to use at the risk of becoming a joint *tort-feasor* and the denial of the right to recover over from the one primarily liable."

Once the independent act creating liability is shown, questions of "primary and secondary" or "active and passive" negligence disappear.

> "There can arise no issue of primary and secondary liability—or question of active or passive negligence—between joint tort-feasors where their concurring act of negligence results in injury to a third party. * * *"
>
> *Fidelity & Casualty Co. of New York v. Federal Express,* 136 F. 2d 35, 42 (C. C. A. 6, 1943).

The possibility of independent liability alleged in both of Sides' complaints, the sole ground for liability expressly mentioned in the settlement agreement, and substantiated by the sparse evidence in the instant record must be negated by libelant in order to prevail. On this record such negation is not present.

It is significant that this action was commenced before the decision in the *Halcyon* case. It is thus not mere speculation to assume that its gravamen was a desire for contribution between joint tort-feasors, a possibility which

then was widely considered available in admiralty personal injury cases.

The theory of contribution was never abandoned by Olympic. Its counsel submitted at the conclusion of the trial that contribution could be awarded not on the theory of joint tort-feasor responsibility but on the theory that money was paid by Olympic for the benefit of Ace in securing a release and a dismissal of Sides' litigation against Ace [R. 161, 163].

Conclusion.

There has been error which appellant asks the Court of Appeals to correct by reversing the District Court's final decree awarding judgment to Olympic Steamship Company, Inc., in the sum of $16,250.85, with interest thereon from date of June 7, 1950, at the rate of seven per cent (7%) per annum. The record clearly fails to establish facts sufficient to support a judgment in the first instance in favor of injured seaman against Olympic. It further fails to negate the possibility that Olympic might not have been equally responsible with Ace for said injury.

Respectfully submitted,

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